addressed through the minimum content requirements for notification that we adopt in this order.[499]

134. We find no reason to impose different notification requirements on large and small carriers, as some commenters suggest.[500] As noted *supra*, although competitive concerns may justify different regulatory treatment for certain carriers, concerns regarding customer privacy are the same irrespective of the carrier's size or identity.[501] Section 222's requirements apply to all carriers.

135. *Content of Notification.* We agree with those commenters that suggest we establish minimum notification requirements.[502] Prescribing minimum content requirements will reduce the potential for customer confusion and misunderstanding,[503] as well as the potential for carrier abuses.[504] While the minimum requirements we establish in this order do not provide precise guidance to carriers, we believe that prescribing such requirements is preferable to other approaches that parties have suggested. Developing general notice requirements strikes an appropriate balance between giving carriers flexibility to craft specific CPNI notices, and ensuring that customers are adequately informed of their CPNI rights.

136. Establishing notice requirements should not confuse customers or constrain a carrier's ability to make timely notice changes, as BellSouth suggests.[505] To the contrary, we find that such requirements generally will reduce confusion by clarifying the customer's CPNI rights, thereby ensuring that any decision by a customer to grant or deny approval is fully informed. While it is possible that customers may experience some initial confusion, given that carriers were not required, in most cases, to provide notification of CPNI rights under our pre-existing requirements, the benefit to consumers of such notification, *i.e.*, heightened

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[499] *See infra* ¶ ¶ 135-142.

[500] AirTouch Comments at 4; Arch Comments at 8-10; LDDS WorldCom Comments at 3-4, 11; MobileMedia Reply at 3.

[501] *See supra* ¶ 49.

[502] AICC Comments at 10 n.18; AT&T Comments at 15; California Commission Comments at 10; CompTel Comments at 11; CPI Comments at 11; CPSR Reply at 8; CWI Comments at 6-9; Excel Comments at 4; ITAA Comments at 6-8; LDDS WorldCom Comments at 10; LDDS WorldCom Reply at 9-10; Texas Commission Comments at 9, 11, Attachment at 19-20; TRA Reply at 11; Washington Commission Comments at 7-8.

[503] AT&T Comments at 15; LDDS WorldCom Comments at 10; LDDS WorldCom Reply at 9-10.

[504] LDDS WorldCom Reply at 9-10; TRA Reply at 11.

[505] BellSouth Comments at 14, 17-18.

awareness of the right to restrict access to sensitive information, is consistent with the intent of section 222, and outweighs any countervailing disadvantages that may result from such notice, such as this initial customer confusion. In addition, because we establish only general notification requirements, carriers retain considerable flexibility to craft notices as they see fit, and thus should not be constrained from making last-minute changes to CPNI notices contrary to BellSouth's contention.[506] Finally, we disagree with BellSouth that specifying minimum notification requirements will waste Commission resources.[507] To the contrary, the failure to set forth such requirements would be far more administratively burdensome, given that any challenges to the adequacy of carrier notices would need to be addressed through individual complaint proceedings under sections 207 and 208 of the Communications Act. We also reject as unduly burdensome CompTel's and ITAA's suggestion that carrier notices be subject to prior Commission review.[508] For the reasons discussed above, we also reject CPI's contention that only the largest incumbent LECs should be required to use a Commission-prescribed form apprising the customer of its CPNI rights.[509]

137. We decline to adopt PacTel's suggestion to establish a "safe harbor" specifying the form of notice that would conclusively be presumed reasonable.[510] The specific requirements for the form and content of notices that we establish in this *Order* provide carriers with adequate guidance, while still preserving carrier flexibility to craft notices as best suits their individual business plans. We explain these requirements in detail below.

138. At a minimum, customer notification, whether oral or written, must provide sufficient information to enable the customer to make an informed decision as to whether to permit a carrier to use, disclose, or permit access to CPNI. If a carrier intends to share CPNI with an affiliate (or non-affiliate) outside the scope of section 222(c)(1), the notice must state

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[506] *Id.*

[507] *Id.*

[508] CompTel Comments at 11; ITAA Comments at 7.

[509] CPI Further Comments at 8. CPI further asserts that this process should be applied to incumbent LECs based on the size categories established in the 1996 Act. For example, CPI contends that incumbent LECs with fewer than two percent of the nation's access lines should be subject to these requirements unless they obtain a waiver by demonstrating that compliance with a Commission-prescribed form would be unnecessarily burdensome, and that rural incumbent LECs should not be subject to the requirements unless an individual carrier can show why the incumbent LEC should be required to use such a form. In the case of solicitations for approval by BOC affiliates and competitive carriers, however, CPI contends that such entities need not use a Commission-prescribed form, nor inform the customer of its right to disclose CPNI to other carriers. *Id.* at 8-10. *See supra* ¶ 133.

[510] PacTel Comments at 12. According to PacTel, such "safe harbor" requirements might include, among other things, a list of the ways in which the carrier intended to use CPNI.

that the customer has a right, and the carrier a duty, under federal law, to protect the confidentiality of CPNI.[511] In addition, the notice must specify the types of information that constitute CPNI[512] and the specific entities that will receive the CPNI,[513] describe the purposes for which the CPNI will be used,[514] and inform the customer of his or her right to disapprove those uses, and to deny or withdraw access to CPNI at any time.[515] The notification also must advise customers of the precise steps they must take in order to grant or deny access to CPNI, and must clearly state that a denial of approval will not affect the provision of any services to which the customer subscribes. Any notification that does not provide the customer the option of denying access, or implies that approval is necessary to ensure the continuation of services to which the customer subscribes, or the proper servicing of the customer's account, would violate our notification requirements.

139. We also require that any notification provided by a carrier for uses of CPNI outside of section 222(c)(1) be reasonably comprehensible and non-misleading.[516] In this regard, a notification that uses, for example, legal or technical jargon could be deemed not to be "reasonably comprehensible" under our requirements. If written notice is provided, the notice must be clearly legible,[517] use sufficiently large type, and be placed in an area so as to be readily apparent to a customer.[518] Finally, we require that, if any portion of a notification is translated into another language, then all portions of the notification must be translated into

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[511] CompTel Comments at 11; CPI Comments at 11; CWI Comments at 6; ITAA Comments at 6-7; ITAA Reply at 9; SBC Comments at 11; Washington Commission Comments at 7-8.

[512] CPSR Reply at 8.

[513] SBC Comments at 11; Texas Commission Comments at 9-11; U S WEST Comments at 18.

[514] CPSR Reply at 8; CWI Comments at 9; U S WEST Comments at 18.

[515] Ad Hoc Comments at 7-8; CFA Comments at 8.

[516] CPSR Reply at 8; CWI Comments at 6, 8; U S WEST Reply at 9.

[517] U S WEST Reply at 9. U S WEST asserts, however, that communications about the value of information sharing within one corporate enterprise are not "promotional or marketing" in nature. *Id.* at 9 n.41.

[518] CPSR Reply at 8; CWI Comments at 6, 8; U S WEST Reply at 9. As an example of a misleading notification, AirTouch points to a PacTel brochure that, it argues, proposes to offer customer awards in exchange for granting the carrier and its affiliates approval to use CPNI to market other services. Airtouch Comments at 9 and Att. A. According to AirTouch, the solicitation for approval to use CPNI is included in small print, and "buried" at the end of the brochure. AirTouch Comments at 9.

that language.[519] We note that this requirement is similar to one we adopted in the context of letters of agency for PIC changes.[520]

140. We agree with CWI that a carrier should not be prohibited from stating in the notice that the customer's approval to use CPNI may enhance the carrier's ability to offer products and services tailored to the customer's needs.[521] We also do not preclude a carrier from addressing the rights of unaffiliated third parties to obtain access to the customer's CPNI. Consequently, a carrier would not be prohibited from, for example, informing a customer that it may direct the carrier to disclose CPNI to unaffiliated third parties upon submission to the carrier of an affirmative written request, pursuant to section 222(c)(2) of the Act.[522] However, a carrier would be prohibited from including any statement attempting to encourage a customer to freeze third party access to CPNI.[523]

141. We also conclude that carriers must provide notification of a customer's CPNI rights, whether oral or written, prior to any solicitation for approval. As stated above, a customer must be fully informed of its right to restrict carrier access to sensitive information before it can waive that right. Any notification that is provided subsequent to a solicitation for customer approval under section 222(c)(1) is inadequate to inform a customer of such right. This conclusion is consistent with the underlying purpose of section 222 to safeguard customer privacy and control over sensitive information. The notification may be in the same conversation or document as the solicitation for approval, as long as the customer would hear or read the notification prior to the solicitation for approval. Finally, we conclude that the solicitation for approval to use CPNI, whether in the form of a signature line, check-off box or other form, should be proximate to the written or oral notification, rather than at the end of a long document that the customer might sign for other purposes, or at the conclusion of a lengthy conversation with the customer, for example. Similarly, the solicitation for approval, if written, should not be on a document separate from the notification, even if such document is included within the same envelope or package. The notice should state that any customer approval, or denial of approval, for the use of CPNI outside of section 222(c)(1) is valid until the customer affirmatively revokes or limits such approval or denial.

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[519] U S WEST Reply at 9 n.41.

[520] *See* 47 C.F.R. § 64.1150(g).

[521] CWI Comments at 6.

[522] As noted above, section 222(c)(2) of the Act provides that "[a] telecommunications carrier shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer. 47 U.S.C. § 222(c)(2). *See supra* note 196.

[523] CWI Comments at 6-7; Washington Commission Comments at 7-8.

142. We conclude that carriers need only provide one-time notification to customers of their CPNI rights, as suggested by some parties.[524] Given the notification requirements we adopt in this order, including the requirement that carriers inform customers that approval to use CPNI under section 222(c)(1) is valid until revoked, we believe that customers granting approval will have been fully informed of the scope and duration of a carrier's use of CPNI, contrary to some parties' assertions.[525] Although we imposed a periodic notice requirement in *Computer III*, such a requirement was more appropriate in that context because the notice and opt-out mechanism generally permitted in *Computer III* militated in favor of more rigorous notification standards. That is, because carriers generally were not subject to an express prior approval requirement for the use of CPNI under *Computer III*, but rather, were permitted to share CPNI based only on notice and opt-out, the approval that was implied under such an approach was based largely on a customer's notification of his or her CPNI rights. In addition, as some parties suggest, requiring carriers to provide periodic notification may be more intrusive to customer privacy than marketing contacts resulting from section 222(c)(1) approval.[526] For these reasons, we reject CWI's contention that an annual notification requirement should be applied only to incumbent LECs,[527] as well as CPSR's assertion that oral notices should be repeated when a customer changes or adds services.[528]

VI. AGGREGATE CUSTOMER INFORMATION

A. Overview

143. To promote the interests of fair competition, section 222 also establishes important carrier obligations regarding aggregate customer information that expressly work in tandem with the carrier requirements surrounding CPNI. Aggregate customer information is defined separately from CPNI in section 222, and involves collective data "from which individual customer identities and characteristics have been removed."[529] On the one hand, as the Commission has found in the past, disclosure of aggregate information by LECs, when

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[524] *See, e.g.*, AT&T Comments at 14-15; Ameritech Reply at 9.

[525] AICC Comments at 10 n.18; CFA Comments at 6-7; CompTel Comments at 11; CPSR Reply at 9; ITAA Comments at 5; LDDS WorldCom Reply at 6; Sprint Comments at 4; Washington Commission Comments at 7.

[526] PacTel Reply at 8-9; U S WEST Reply at 8 n.33.

[527] CWI Comments at 7. We likewise decline to adopt CPI's suggestion that the notification requirements should vary depending upon the size of the incumbent LEC or the identity of the carrier seeking approval. CPI Further Comments at 8.

[528] CPSR Reply at 9.

[529] 47 U.S.C. § 222(f)(2).

used to gain entry in new markets, is valuable and important to the LECs' competitors in these new markets. On the other hand, because aggregate customer information does not involve personally identifiable information, as contrasted with CPNI, customers' privacy interests are not compromised by such disclosure. New section 222(c)(3) governing aggregate customer information, accordingly, strikes a balance different from that governing CPNI. It extends the Commission's requirement that aggregate customer information be disclosed, which operated solely in the enhanced services and CPE markets and which applied only to the BOCs and GTE, to the new statutory scheme applicable to all markets, including long distance and CMRS, and to all LECs.

144. As we discuss below, because section 222(c)(3) offers an important competitive benefit, which is integral to the balance Congress drew regarding carrier use of customer information and rationally distinguishes among carriers, we reject claims that section 222(c)(3) in conjunction with section 222(c)(1) may constitute an unconstitutional taking or an equal protection violation. Rather, as implemented in this order, section 222(c)(3) permits LECs to use aggregate customer information to improve their customers' existing service, and when they choose to use it for purposes beyond their provision of service in section 222(c)(1)(A), they must make it available to their competitors upon request. We further conclude that section 222(c)(3)'s nondiscrimination obligation requires that LECs honor standing requests for disclosure of aggregate customer information at the same time and same price as when they disclose to, or use on behalf of, their affiliates.

B. Background

145. Section 222(f)(2) defines aggregate customer information as: "collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed."[530] This definition is virtually identical to the definition of "aggregate information" promulgated by the Commission prior to the 1996

[530] *Id.* This contrasts with CPNI, which is defined in section 222(f)(1) as including personal information such as "(A) information that relates to the quantity, technical configuration, type, destination , and amount of use of a telecommunications service subscribed to by any customer . . and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service reviewed by a customer of a carrier; . . . ."

Act.[531] Section 222(c)(3), which governs carriers' use of aggregate customer information, provides:

> A telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph [222(c)](1). A local exchange carrier may use, disclose, or permit access to aggregate customer information other than for purposes described in paragraph (1) only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.[532]

146. Although section 222(c)(3) concerning aggregate customer information differs from section 222(c)(1) governing CPNI, the obligations in these provisions expressly dovetail. Section 222(c)(3) provides that when carriers, other than LECs, aggregate their individually identifiable customer information, they may use, disclose or permit access to such aggregate customer information for purposes other than those permitted under section 222(c)(1). In this way, for carriers other than LECs, section 222(c)(3) operates to eliminate the limitations in section 222(c)(1) on carrier use of customer information, when individually identifiable characteristics and identities are removed. When LECs use, disclose, or permit access to aggregate customer information for purposes beyond section 222(c)(1)(A) or (B), they must provide such aggregate customer information on a nondiscriminatory basis to other persons, including carriers, upon reasonable request.

147. As part of the *Computer III* rules established prior to the 1996 Act, the Commission requires the BOCs and GTE to provide aggregate customer information to enhanced service providers when they share such information with their enhanced service affiliates.[533] The Commission also requires the BOCs to provide aggregate customer

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[531] Prior to the 1996 Act, in the context of the *Caller ID* proceedings, the Commission defined the term "aggregate information" in its rules to "mean collective data that relate to a group or category of services or customers, from which individual customer identities or characteristics have been removed." 47 C.F.R. § 64.1600(a). The only difference between this definition of aggregate information and section 222(f)(3)'s is that the former definition used "or" rather than "and" in the final clause. This understanding of the term aggregate information is reflected as well in the Commission's *Computer III* proceedings, which consistently described aggregate information in terms of anonymous, non-customer specific information, involving data showing traffic and usage patterns. *See, e.g., Computer III Phase II Order* at 3096-97, ¶¶ 166-74; *BOC CPE Relief Order* at 153, ¶ 70.

[532] 47 U.S.C. § 222(c)(3).

[533] *GTE Safeguards Order* at 4945, ¶ 45; *Computer III Phase II Order* at 3096-97, ¶ ¶ 166-174. The Commission recognized that aggregate customer information is beneficial for competitors because "one can infer that the information has potential value if the carrier's own enhanced service operations make use of it."

information to CPE suppliers when they share such information with their CPE affiliates.[534] In addition, the Commission presently requires the BOCs and GTE generally to notify carriers when aggregate customer information is available, and the Commission has approved a series of alternatives for compliance with such notification obligation.[535] The Commission excluded AT&T from the aggregate disclosure and notice requirements, reasoning that "if AT&T had to make aggregated CPNI available, there is a strong possibility that its network service competitors would obtain this information and use it in their basic service marketing efforts. The BOCs do not face the same potential competitive threat to their network service operations from the aggregated CPNI requirement."[536]

148. Commenters raise two issues in connection with section 222(c)(3)'s new aggregate customer information requirements. First, U S WEST and USTA argue that, if we adopt an interpretation of the scope of sections 222(c)(1)(A) and (B) narrower than the single category approach, as we do in this order, the disclosure obligation of LECs regarding aggregate customer information under section 222(c)(3) would correspondingly be greater.[537] As such, they claim that the operation of these two provisions would constitute both an unconstitutional taking and an Equal Protection violation because it would force LECs to release commercially valuable information to third parties, while their competitors would have no comparable obligation.[538] Second, in the *Notice*, the Commission sought comment on whether, in addition to the statutory requirements of section 222, the Commission should also require all LECs to notify others of the availability of aggregate customer information prior to their using the information, as is required under the *Computer III* framework.[539] Several parties argue that we should not impose such a requirement because there is no notice requirement under section 222(c)(3).[540] Furthermore, they argue, notice of the availability of

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Computer III Phase II Order at 3097, ¶ 172. Competing enhanced service providers indicated in that proceeding as well, that they pay considerable sums of money to gather comparable information, particularly traffic and usage patterns, from public sources. *Id.* at 3096, ¶ 167.

[534] *BOC CPE Relief Order* at 153, ¶ 70.

[535] *BOC ONA Order* at 233-34, ¶ ¶ 448- 450. *GTE ONA Order*, 11 FCC Rcd 1388 (1995).

[536] *Computer III Phase II Recon. Order* at 1164, ¶ 115.

[537] U S WEST Comments at 20; USTA Comments at 7-8.

[538] *Id.*

[539] *Notice* at 12529, ¶ 37.

[540] ALLTEL Comments at 6; Ameritech Reply at 10; NYNEX Comments at 23; SBC Reply at 13; USTA Reply at 8; *see also* CBT Comments at 11(the Commission should not adopt a notification requirement for LECs).

LEC aggregate customer information would give competitors unfair notice of LEC marketing plans.[541] In contrast, ITAA disagrees, and further suggests that there may be more efficient ways of giving notice than what we require under *Computer III (e.g.*, publishing in trade publications or newsletters).[542]

C. Discussion

149. We reject the claim that our interpretation of sections 222(c)(1) and 222(c)(3) would constitute an unlawful taking. As we discussed earlier,[543] even assuming carriers have a property interest in either CPNI or aggregate customer information, our interpretation of sections 222(c)(1) and 222(c)(3) does not "deny all economically beneficial" use of property, as it must, to establish a successful claim.[544] First, under our interpretation of these provisions, when CPNI is transformed into aggregate customer information, carriers, other than LECs (and LECs with disclosure), are free to use the aggregate CPNI for whatever purpose they like, including for example, to assist in product development and design, as well as in tracking consumer buying trends, without customer approval. This means that a long distance carrier, for example, may use collective data regarding customer usage patterns, derived from its long distance service, to assist its CMRS affiliate; such collective data may indicate, for instance, which regions are experiencing growth and thereby help identify where to locate CMRS-related regional sales forces. Aggregate information may also be useful to carriers to match certain types of consumers with service offerings that they may find attractive. A long distance carrier, again for example, could aggregate its CPNI to develop profiles of customers most likely to purchase CMRS service. Under our interpretation of section 222(c)(1)(A), for customers that are also the carrier's CMRS customer, the carrier could use the profile to identify customers that may favor the new CMRS offering. For existing long distance customers that do not also subscribe to the carrier's CMRS, the carrier would have to obtain customer approval to use the customers' CPNI to market CMRS service to them. With customer approval, however, by operation of section 222(c)(3), the long distance carrier could compare the customer profile (derived from aggregate customer information) with the customer's CPNI, to tailor its marketing strategy for new CMRS service to that customer. In these ways, by permitting aggregate information to be used in these ways, section 222(c)(3) affords important commercial benefits for carriers and customer alike, without impacting customer privacy concerns.

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[541] Ameritech Reply at 10; NYNEX Comments at 23.

[542] ITAA Comments at 8.

[543] *See* discussion *supra* Part IV.

[544] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

150. Although LECs face certain obligations when they use aggregate customer information under section 222(c)(3), Congress did *not* require that LECs give aggregate customer information to their competitors upon request in all circumstances. Rather, when LECs use this aggregate information only to tailor their service offering to better suit the needs of their existing customers -- that is, within the scope of sections 222(c)(1)(A) and (B), LECs do not need to disclose the aggregate information.[545] Moreover, LECs are *permitted* to use the aggregate information when targeting new service customers -- that is, for purposes beyond the scope of section 222(c)(1)(A) and (B). When they do so, LECs simply must give that information to others upon request. This means that, as in the example above, LECs, like long distance carriers may use aggregate customer information for valuable business and marketing purposes. Where LECs use or disclose the aggregate information for marketing service to which the customer does not subscribe, however, LECs can still use the information, but must disclose the aggregate information to others upon request. Our interpretation, therefore, does not deprive LECs of all economic benefit associated with their customer information, and we accordingly find claims to the contrary to be without merit.

151. We also reject parties' Equal Protection challenge. In order to sustain an equal protection challenge, parties challenging the law must prove that the law has no rational relation to any conceivable legitimate legislative purpose.[546] Making LEC aggregate customer information available on nondiscriminatory terms, when used for purposes beyond those in sections 222(c)(1)(A) and (B), is reasonably related to the legitimate goal of promoting open competition in telecommunications markets. Indeed, as CFA points out, Congress sought a balance in the relationship between the carrier's permissible uses of CPNI in sections 222(c)(1)(A) and (B), which need not be disclosed to competitors because personal information is at stake, and section 222(c)(3)'s aggregate customer information, which requires disclosure based on competitive interests.[547] In singling out LECs in section 222(c)(3), Congress reasonably recognized that LECs, as former monopoly providers, maintain a competitive advantage with regard to use of customer information. Specifically, because of their former monopoly status, LECs enjoy the benefit of accumulated customer information on all telephone subscribers within a certain geographic location, not merely those that have "chosen" their service. Also, to the extent there is some correlation between usage of local exchange and long distance service or CMRS, LECs theoretically "know" the most profitable customers (*i.e.*, heaviest users) of *all* IXCs and CMRS providers operating within their region, as well. LECs obtained this information, as AT&T argues, not because

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[545] We agree that, under the terms of section 222(c)(3), aggregate customer information used for purposes within Section 222(c)(1) is not subject to the nondiscrimination disclosure requirement. *See, e.g.*, Ameritech Reply at 10; GTE Comments at 3 n.5; Pacific Telesis Reply at 13; SBC Reply at 13-14 & n.49; U S WEST Comments at 20.

[546] *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

[547] CFA Comments at 6.

they provided exceptional service, but because customers had no choice but to subscribe to them.[548]

152. Section 222 requires only that when LECs seek to target customers based on aggregate customer information which create generalized "profiles" of groups of customers likely to respond favorably to service offerings outside their existing service, they must also make these group profiles available to their competitors. In this way, Congress sought to rectify the LECs' advantage in scope and wealth of CPNI, while at the same time not compromising customers' privacy interests. The aggregate rule rationally serves Congress' goal of encouraging competitive markets, through availability of aggregate customer information, while protecting CPNI from disclosure absent customer approval, and thus is Constitutional.[549]

153. Finally, regarding the LECs' notice obligations, the nondiscrimination requirement in section 222(c)(3) protects competitors from anticompetitive behavior by requiring that LECs make aggregate customer information available "upon reasonable request." We interpret these terms to permit a requirement that LECs honor standing requests for disclosure of aggregate customer information at the same time and same price as when disclosed to, or used on behalf of, their affiliates. We are persuaded that such standing requests adequately address the competitive concerns formerly protected through our notice requirement.

VII. SECTION 222 AND OTHER ACT PROVISIONS

A. Overview

154. Section 222 by its terms extends to "all telecommunications carriers," including, therefore, the BOCs. Unlike other carriers, however, BOCs are subject to certain structural separation and nondiscrimination requirements set forth in sections 272 through 276

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[548] AT&T Further Reply at 6.

[549] *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993); *see also California v. F.C.C.*, 39 F.3d 919, 923-24. (9th Cir. 1994) (*California III*) (*subsequent history omitted*)(upheld Commission's differential treatment and regulation of BOCs in their provision of enhanced services based on BOCs potential power to exploit their monopoly to obtain an unfair competitive advantage in other markets and prevent the development of enhanced services competition). We note that the practical effect of the distinction in section 222(c)(3) may wane with the advent of local competition and LEC entry into long distance markets. This is so because, if the carriers are correct, and customers will obtain all their telecommunication services in "one-stop" from one carrier, then use of aggregate information to provide their customers such "full service" will trigger no disclosure obligation by LECs; the nondiscrimination obligation in section 222(c)(3) applies only for use of aggregate information to market outside the customer's total service relationship.

of the Act.[550] More specifically, section 272 provides: "[I]n its dealings with its [long distance, interLATA information services, or manufacturing affiliates (section 272 affiliates)], a Bell operating company (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information . . ."[551] In the *Non-Accounting Safeguards Order*, the Commission found that "the term 'information' includes, but is not limited to, CPNI and network disclosure information."[552] Based on the further record developed in this proceeding, we revisit and overrule the Commission's prior conclusion that the reference to "information" in section 272 includes CPNI. We agree with the BOCs that the specific balance between privacy and competitive concerns struck in section 222, regarding all carriers' use and disclosure of CPNI, sufficiently protects those concerns in relation to the BOCs' sharing of CPNI with their statutory affiliates. We accordingly interpret section 272, as well as section 274, which raises similar issues, to impose no additional CPNI requirements on the BOCs when they share CPNI with their statutory affiliates.

B. Section 222 and Section 272

1. Background

155. As noted above, the Commission concluded in the *Non-Accounting Safeguards Order* that the term "information" includes CPNI and that the BOCs must comply with the requirements of both sections 222 and 272(c)(1).[553] The Commission declined to address parties' other arguments regarding the interplay between section 272(c)(1) and section 222 to avoid prejudging issues in this CPNI proceeding. The Commission also declined to address parties' arguments regarding the interplay between section 222 and section 272(g), which permits certain joint marketing between a BOC and its section 272 affiliate. The Commission emphasized, however, that, if a BOC markets or sells the services of its section 272 affiliate pursuant to section 272(g), it must comply with the statutory requirements of section 222 and any rules promulgated thereunder.[554]

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[550] We note that on December 31, 1997, the United States District Court for the Northern District of Texas held that sections 271-275 of the Act are a bill of attainder and thus are unconstitutional as to SBC Corporation and U S WEST. *SBC Communications, Inc. v. Federal Communications Comm'n*, No. 7:97-CV-163X, 1997 WL 800662 (N.D. Tex. Dec. 31, 1997)(ruling subsequently extended to Bell Atlantic), *request for stay granted*. In general, the analysis in this order assumes the continued applicability of these provisions to the BOCs.

[551] 47 U.S.C. § 272(c)(1).

[552] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22010, ¶ 222, *supra* note 45.

[553] *Id.*

[554] *Id.* at 22050, ¶ 300.

156. On February 20, 1997, the Common Carrier Bureau released a public notice seeking further comment to supplement the record in this proceeding on various issues relating to the interplay between section 222 and other sections of the Act.[555] The questions raised concerning the interplay of sections 222 and 272 included, among other things: (i) the meaning and scope of the nondiscrimination obligation in connection with "information" and "services" in sections 272(c)(1) and 272(e)(2) as they relate to CPNI;[556] (ii) the customer approval requirements for BOCs sharing CPNI with their section 272 affiliates and unaffiliated entities; and (iii) the application of section 272(g)(3), which exempts certain joint marketing activity from the "nondiscrimination provisions of this subsection."[557]

157. Several commenters argue that section 272 imposes separate and independent requirements on the sharing by BOCs of CPNI with their section 272 affiliates that are additional to the obligations established for all carriers under section 222.[558] Commenters further contend that section 272 obligates BOCs that *solicit* customer approval for sharing CPNI with their 272 affiliates to solicit such approval on behalf of non-affiliated entities as well.[559] The BOCs, in contrast, argue that section 272 does not extend to their use, disclosure, or permission of access to CPNI.[560]

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[555] *Public Notice*, 12 FCC Rcd 3011, *supra* note 50.

[556] Section 272(c)(1) provides that, in its dealings with its section 272 affiliates, a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, *services*, facilities, and *information*, or in the establishment of standards; . . . ." 47 U.S.C. § 272(c)(1) (emphasis added). Section 272(e)(2) provides that a BOC "shall not provide any facilities, *services, or information* concerning its provision of exchange access to the affiliate described in section (a) unless such facilities, *services, or information* are made available to other providers of interLATA service in that market on *the same terms and conditions*; . . . ." 47 U.S.C. § 272(e)(2) (emphasis added).

[557] Section 272(g)(3) provides: "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection [272](c)." 47 U.S.C. § 272(g)(3).

[558] AirTouch Further Comments at 3; ALLTEL Further Comments at 2; ALLTEL Further Reply at 1; AT&T Further Comments at 4; California Commission Further Comments at 4; Cox Further Comments at 2-3; LDDS WorldCom Further Comments at 3-5; MCI Further Comments at 11; Sprint Further Comments at 1; TRA Further Comments at 3-4.

[559] ALLTEL Further Comments at 6; AT&T Further Comments at 12-13; AT&T Further Reply at 10-11; Cox Further Comments at 6; California Commission Further Comments at 4-5; LDDS WorldCom Further Comments at 10-11; Sprint Further Comments at 8-9; TRA Further Comments at 10-12.

[560] *See, e.g.*, Ameritech Further Comments at 9; Bell Atlantic/NYNEX Further Comments at 1-2, att. at 1; Bell Atlantic/NYNEX Further Reply at 2-3; BellSouth Further Comments at 4; PacTel Further Comments at 3, 6; SBC Further Comments at 6; U S WEST Further Comments at 11.

2. Discussion

158. We recognize an apparent conflict between sections 222 and 272. Under the total service approach, we have found that section 222 permits affiliated entities to share CPNI of the customers that already subscribe to service from those affiliates. Should CPNI be deemed to be "information" or "services" that would trigger application of section 272, however, then the BOCs would be unable to share CPNI with their affiliates to the extent contemplated by section 222. The section 272(c)(1) requirement that "information" or "services" be shared only on nondiscriminatory terms would, we believe, mean that BOCs could share CPNI among their affiliates only pursuant to express approval. Thus, CPNI sharing under section 222(c)(1)(A) (based on implied approval under the total service approach) would be precluded.[561] Although we find that section 222 envisions a sharing of customer CPNI among those related entities that provide service to the customer, such a sharing among BOC affiliates would be severely constrained or even negated by the application of the section 272 nondiscrimination requirements.

159. In addition, the application of section 272 to CPNI sharing would seem to require that, when BOCs seek customer approval to share with their statutory affiliates (in the context of either inbound or outbound marketing), they must simultaneously solicit approval for CPNI sharing on behalf of all other carriers that ask them to do so. As discussed below, we question whether procedures could be implemented to provide for truly effective customer notice and opportunity for informed approval under such circumstances. Further, such comprehensive multi-carrier solicitation would likely be so burdensome that, as a practical matter, BOCs would be effectively precluded from seeking approval for affiliate sharing by means of oral solicitation -- a result not contemplated by section 222.

160. We find no express guidance from the statutory language as to how Congress intended to reconcile these provisions. On the one hand, invoking the principle of statutory construction that the "specific governs the general," the BOCs contend that section 222 specifically governs the use and protection of CPNI, whereas section 272 only refers to "information" generally. Accordingly, they claim, section 222 should "trump" section 272.[562] On the other hand, based on the same statutory principle, different parties counter that section 272 specifically governs the BOCs' sharing of information with its affiliate, whereas section 222 only generally relates to all carriers. From this perspective, section 272 should

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[561] We note that if BOCs attempted to satisfy their section 272 nondiscrimination requirements by disclosing CPNI to non-affiliated entities without express customer approval, such disclosure would violate the requirements of section 222 that such sharing is permitted only among entities with whom the customer has a prior service relationship.

[562] *See, e.g.*, Ameritech Further Comments at 9; Bell Atlantic/NYNEX Further Comments at 1-2, A-1; Bell Atlantic/NYNEX Further Reply at 2-3, 7; BellSouth Further Comments at i-ii, 2 n.5, 4; PacTel Further Comments at 6; U S WEST Further Comments at 11; *accord* SBC Further Comments at 1-2, 6.

control section 222.[563] We find that either interpretation is plausible. Because Congress did not make its intent clear, our resolution of the apparent conflict must therefore be guided by the interpretation that, in our judgment, best furthers the policies of these two provisions, and thereby, best reflects the statutory design. On this policy basis, we believe that interpreting section 272 to impose no additional obligations on the BOCs when they share CPNI with their statutory affiliates according to the requirements of section 222, as implemented in this order, most reasonably reconciles the goals of these two provisions. This is so because imposing section 272's nondiscrimination obligations when the BOCs share CPNI with their section 272 affiliates would not further the principles of customer convenience and control embodied in section 222, and could potentially undermine customers' privacy interests as well, while the anticompetitive advantages section 272 seeks to remedy are sufficiently addressed through the mechanisms in section 222 that seek to balance the competitive concerns regarding LECs' use and protection of CPNI.[564]

161. Should we interpret section 272 to apply when the BOCs' share CPNI with their statutory affiliates, BOCs may simply choose not to disclose their local service CPNI, and thereby avoid their nondiscrimination obligations. This could occur even where the BOC and its affiliate share the same customer (and therefore under the total service approach would be permitted to use or disclose CPNI absent customer approval under section 222(c)(1)(A)), or where it has obtained express approval from its customers to do so. This outcome, however, would not serve the various customer interests envisioned under section 222. First, customers would be deprived of benefits associated with use and disclosure of CPNI among affiliated entities, upon customer approval. For example, customers would not be able to take advantage, if they chose, of tailored marketing, which is currently possible under our implementation of sections 222(c)(1) and (d)(3).[565] Second, maintaining separate customer service records for local and long distance BOC offerings, where both are subscribed to by the same BOC customer, would also not serve the customer's interest in receiving service in a convenient manner.[566] Indeed, if, as AT&T suggests,[567] the only way in which BOCs could

[563] *See, e.g.*, ALLTEL Further Comments at 2; Cox Further Comments at 3.

[564] Bell Atlantic/NYNEX Further Comments at 1-2; SBC Further Comments at 1, 2; U S WEST Further Comments at 11. Because we interpret section 272 to impose no additional CPNI-related obligations, we need not and do not address the other arguments raised by the BOCs, including (and in particular) their interpretation of section 272(g)(3), and their argument that treating BOC affiliates as unaffiliated entities would violate the BOCs' First Amendment rights to communicate with their affiliates and customers. *See, e.g.*, BellSouth Further Comments at 3, 19-20; PacTel Further Comments at 8, 12, 14-15; U S WEST Further Comments at 19.

[565] *See* discussion *supra* ¶¶ 54, 55.

[566] *See* discussion *supra* ¶ 57.

share information with statutory affiliates and not trigger section 272's nondiscrimination requirements would be for BOCs to disclose CPNI to their section 272 affiliates upon written customer request secured by the BOC affiliate, customer convenience goals would not be furthered.[568]

162. The alternative, should BOCs nevertheless choose to share CPNI with their section 272 affiliates, and we were to find section 272 applicable to CPNI, would likewise be problematic. First, BOCs would not be able to disclose CPNI to non-affiliated entities for the purpose of ensuring competitive access to CPNI consistent with section 222. Although the statute permits the sharing among affiliated entities within the meaning of the exceptions in sections 222(c)(1)(A) and (B), the language does not support use or disclosure of CPNI beyond the carrier's "provision of the telecommunication service from which such information is derived."[569] Disclosure to other companies to maintain competitive neutrality cannot reasonably be construed to constitute "the provision" of such service.[570] Such a result would defeat, rather than protect, customers' privacy expectations, and their control over who can use, disclose, or permit access to such information, as set forth in section 222(c). For the reasons described above, however, prohibition of such sharing would not serve the customer convenience interests underlying section 222.

163. Second, the proposal that BOCs disclose CPNI to unaffiliated entities on the same customer approval terms as they share with their section 272 affiliates, raises similar concerns. Requiring that BOCs disclose CPNI to unrelated entities upon oral customer approval when they share CPNI with their section 272 affiliates upon oral approval, would not necessarily be inconsistent with the policies or language of section 222. We see no principled basis, however, upon which not to impose other obligations required by section 272. That is, if section 272's non-discrimination obligation applies to the form of customer approval, we agree that it would also apply when BOCs solicit customer approval to

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[567] In particular, AT&T argues that, although section 222(c)(1) does not require a customer's affirmative written consent, if the BOC's section 272 affiliate obtains express written approval, as any unaffiliated entity could do under section 222(c)(2), then the BOC may disclose CPNI to its 272 affiliate *without* disclosing it to other unaffiliated entities. AT&T Further Comments at 6-7; AT&T Further Reply at 4; AirTouch Further Comments at 4-5.

[568] As discussed *supra* ¶ 112, oral approval substantially facilitates carrier and customer dialogue, and customer convenience. *See also* CPI Further Comments at 6 (barring the release of CPNI without the express written consent of the consumer would harm the interests of consumers in receiving service conveniently).

[569] 47 U.S.C. § 222(c)(1)(A).

[570] CPI Further Comments at 5-6.

share with their statutory affiliates.[571] We do not believe, however, that requiring BOCs to solicit approval for unspecified "all other" entities would constitute either effective notice or informed approval. We agree with SBC that customers cannot knowingly approve release of CPNI unless and until they are made aware of the identity of the party which is to receive the information.[572] Alternatively, as a practical matter, it would be difficult for BOCs to provide specific notice, and obtain informed approval, for each entity that so requests. To do so would severely restrict the BOCs' ability effectively to market, particularly in the inbound marketing context contemplated under section 222(d)(3), and thereby would again undermine the customer convenience policies of section 222.

164. Our interpretation is further based on the fact that, as a policy matter, the three specific mechanisms in section 222 that address the competitive concerns implicated by a BOC's use of CPNI render the application of section 272's nondiscrimination requirement not essential.[573] First, through section 222(c)(1), as implemented in this order, BOCs cannot share CPNI with their section 272 affiliates unless they either obtain express customer approval or, in the case of long distance, the customer is an existing subscriber to the affiliate's long distance offering.[574] Oral approval appropriately limits carrier's anti-competitive use of CPNI.[575] As we have explained above, CPNI sharing among affiliated entities to whom the customer already subscribes is unlikely to have anti-competitive effects since any such sharing does not allow carriers to target new customers, but merely assists carriers in tailoring their service offering in a manner that may be more beneficial to existing customers.[576]

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[571] In particular, carriers argue that such solicitation constitutes both the "provision . . . of . . . services" for the BOC's affiliate and the "procurement of . . . information" to that affiliate, both of which trigger the nondiscrimination obligation under section 272(c)(1). ALLTEL Further Comments at 6; AT&T Further Comments at 12-13; AT&T Further Reply at 10-11; Cox Further Comments at 6; California Commission Further Comments at 4-5; LDDS WorldCom Further Comments at 10-11; Sprint Further Comments at 8-9; TRA Further Comments at 10-12. According to AT&T, this language requires that BOCs obtain a blanket approval from customers to disclose CPNI to any requesting affiliated or unaffiliated entity, and that customers should not be permitted to authorize disclosure only to the BOC affiliate. AT&T Further Reply at 10-11; *see also* CPI Further Comments at 8 (approval form should give consumers the choice of providing CPNI to carriers other than the BOC).

[572] SBC Further Comments at 10-11.

[573] We note, however, that our interpretation does not render the BOCs' nondiscrimination obligations as to "information" or "services" in section 272 meaningless. The requirement would apply to the BOCs' sharing of all other information (*i.e.*, non-CPNI) and services with their section 272 affiliates.

[574] *See* discussion *supra* Parts IV and V, announcing our interpretation and implementation of section 222(c)(1).

[575] *See* discussion *supra* ¶ 114.

[576] *See supra* ¶ 59.

165. Second, competitors are afforded access to customer CPNI through section 222(c)(2), which requires disclosure of CPNI to entities unaffiliated with BOCs upon their obtaining a customer's affirmative written request."[577] Through this provision, BOCs cannot exclusively advantage their affiliates, and must provide competitors access when the customer says so. Third, section 222(c)(3), which governs aggregate customer information, directly addresses the particular competitive advantages obtained by LECs' store of customer information. As discussed earlier, through this provision, Congress sought to rectify the LECs' advantage in scope and wealth of CPNI, that derives from their historic and continuing market power and not from their skill in competition, while at the same time not compromising customers' privacy interests.[578]

166. Further mitigating competitive concerns, beyond section 222, is the fact that, BOCs, as incumbent local exchange carriers, may also be subject to obligations under section 251 to disclose customer information as part of their interconnection obligations upon the oral approval of customers.[579] In addition, as we indicated earlier, section 201(b) remains fully applicable where it is demonstrated that carrier behavior is unreasonable and anticompetitive.

167. Finally, we note that our conclusion is consistent with the regulatory symmetry Congress intended for carrier marketing activities.[580] Our interpretation requires that all carriers, including BOCs, LECs, CLECs, and IXCs, obtain customer approval before using CPNI to market offerings outside the customer's existing service relationship. In this way, no carrier or group of carriers obtain a competitive advantage in marketing.[581]

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[577] 47 U.S.C. § 222(c)(2).

[578] *See* discussion *infra* Part VI.

[579] *See* discussion *supra* Part IV.D.2.

[580] This regulatory symmetry is evidenced by the inter-relationship of sections 271(e) and 272(g). Section 271(e)(1) imposes a prohibition on the joint marketing of interLATA services and resold BOC local services by interexchange carriers until a BOC receives 271 approval to enter into in-region interLATA services or until 36 months have passed from the date of enactment of the 1996 Act, whichever is earlier. We noted in the *Non-Accounting Safeguards Order* that Congress adopted section 271(e) in order to limit the ability of interexchange carriers with more than 5% of the Nation's presubscribed access lines to provide "one-stop shopping" of certain services until a BOC similarly is authorized to provide interLATA service in the same territory. Section 272(g)(2) further limits a BOC's provision of interLATA services by providing that a BOC's section 272 affiliate may not market or sell interLATA services within any of its in-region States until the BOC is authorized to provide interLATA services in such State under section 271(d).

[581] *See e.g.*, Ameritech Further Comments at 7 (to ensure that BOCs are able "to engage in the same type marketing activities as other service providers," the consent requirements imposed on a BOC's use of CPNI to market the services of its section 272 affiliate should be no more onerous than those imposed on AT&T's or MCI's use of interLATA CPNI in the marketing of their local exchange services).

168. The fact that Congress requires BOCs to establish separate affiliates that must operate independently from the BOC entity that offers local exchange service, does not, as some parties contend,[582] alter our conclusion. Rather, the separate affiliate requirement serves other important purposes such as preventing anticompetitive cost-shifting that may arise when a BOC enters the interLATA services market in an in-region state in which the local exchange market is not yet fully competitive. Moreover, in the *Non-Accounting Safeguards Order*, the Commission held that the "operate independently" requirement in section 272(b)(1) does not preclude the sharing of administrative and other services.[583] In addition, the exception in section 272(g)(2) further contemplates that BOCs can maintain relationships with their long distance affiliates, when they jointly market the services of these affiliates, that would not be subject to nondiscrimination principles. Accordingly, suggestions that Congress intended to erect a kind of impermeable "Chinese wall" between BOCs and their section 272 affiliates, for all purposes, are overstated. Rather, section 272 is intended to ensure that BOCs do not give their affiliates a competitive advantage, and for the reasons described herein, section 222 fully and specifically balances these concerns in relation to CPNI for LECs. In contrast, applying section 272 to the BOCs' sharing of CPNI with their statutory affiliates would not permit the goals and principles of section 222 to be realized fully as we believe Congress contemplated. We resolve this conflict between sections 272 and 222, therefore, in favor of the interpretation that, as a policy matter, we believe best furthers all of Congress' goals -- that section 222, and not section 272, governs all carriers, including BOCs, use and protection of CPNI.[584]

169. For all these reasons, we conclude that the most reasonable interpretation of sections 222 and 272 is that section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates. Accordingly, we overrule our prior conclusion to the contrary in the *Non-Accounting Safeguards Order*.

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[582] AT&T Further Comments at 7-8 (section 272(a)(1)(A)'s requirement that affiliates be "separate from any operating company entity" and section 272(b)(1)'s prescription that separate affiliate "operate independently" from the BOC form bases for treating BOC affiliates as unaffiliated entities); AT&T Further Reply at 4-5 (same); MCI Further Comments at 15-16 (same).

[583] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21986, ¶ 168. The scope of what constitutes administrative services is currently among the pending issues on reconsideration.

[584] Although some have argued that our resolution of this issue is inconsistent with the manner in which we have resolved tensions between sections 222 and 275(d), we disagree. The relevant language of section 275(d) is quite distinct from the language in section 272(c)(1), and those textual differences merit different resolutions of tensions between section 222 and sections 275(d) and 272, respectively.

C. Section 222 and Section 274

1. Background

170. The Commission confirmed that electronic publishing is an information service in its *Electronic Publishing Order*, released on February 7, 1997.[585] Section 222(c)(1), as implemented in this proceeding, restricts carriers from using, disclosing, or permitting access to CPNI, derived from the provision of a telecommunications service, for marketing information services and other services unless they obtain express customer approval.[586] This means that customer approval is a prerequisite for *any* carrier's use or disclosure of CPNI for electronic publishing purposes.

171. Section 274 permits BOCs to provide electronic publishing services only through a "separated affiliate" or "electronic publishing joint venture" that meets certain separation, nondiscrimination, and joint marketing requirements.[587] In the *Electronic Publishing Order*, the Commission promulgated policies and rules governing the BOCs' provision of electronic publishing under section 274. The Commission deferred to this proceeding any decision on the extent that section 222 affects implementation of the joint marketing provisions of section 274.[588] The Commission also deferred to this proceeding the following issues: (i) whether the term "basic telephone service information," as defined in section 274(i)(3), includes CPNI; (ii) whether section 222 requires a BOC engaged in permissible marketing activities under section 274(c)(2) to obtain customer approval before using, disclosing, or permitting access to CPNI; and (iii) whether or to what extent section 274(c)(2)(B) imposes any obligations on BOCs that use, disclose, or permit access to CPNI pursuant to a "teaming" or "business arrangement" under that section.[589]

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[585] *Electronic Publishing Order*, 12 FCC Rcd at 5407-08, ¶ 110, *supra* note 48.

[586] *See* discussion *supra* Part IV.C.2.

[587] In particular, in the joint marketing provision, two nondiscrimination obligations are imposed. First, section 274(c)(2)(A) provides that: "[a] Bell operating company may provide inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher: *Provided*, That if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, *such services* shall be made available to all electronic publishers on request, *on nondiscriminatory terms*." (emphasis added). Second, section 274(c)(2)(B) provides: [a] Bell operating company may engage in *nondiscriminatory teaming or business arrangements* to engage in electronic publishing with any separated affiliate or with any other electronic publisher if (i) the Bell operating company only provides facilities, *services, and basic telephone service information* as authorized by this section, and (ii) the Bell operating company does not own such teaming or business arrangement." (Emphasis added).

[588] *Electronic Publishing Order*, 12 FCC Rcd at 5420, ¶ 142, *supra* note 48.

[589] *Id.* at 5432-33, ¶ 169.

172. In the *Public Notice* released by the Common Carrier Bureau on February 20, 1997, further comment was also sought regarding the interplay between sections 222 and 274, including on, among other things: (i) the meaning and application of the nondiscrimination obligations in sections 274(c)(2)(A) and 274(c)(2)(B); and (ii) customer approval requirements for BOCs sharing of CPNI with electronic publishing affiliates, joint ventures, and unaffiliated entities.[590] In response to this notice, two commenters contend that section 274, like section 272, imposes additional requirements on the ability of BOCs to provide certain services and to share information with their electronic publishing affiliates or partners in particular contexts that go beyond the requirements of section 222.[591] In contrast, although the BOCs acknowledge that some form of customer approval is required before CPNI can be used to market electronic publishing services, they argue that there is no statutory requirement related to the *disclosure* of CPNI in section 274(c)(2)(A).[592] In addition, the BOCs argue that they have no general obligation under either section 274(c)(2)(A) or 274(c)(2)(B) to solicit customers to obtain CPNI release for any entity, whether affiliated or unaffiliated.[593]

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[590] *Supra* note 50.

[591] AT&T Further Comments at 21; Cox Further Comments at 12. In particular, these commenters argue that, if a BOC intends to access a customer's CPNI, without a customer's affirmative written consent, as part of an inbound telemarketing contact or referral service for the benefit of a separated affiliate or joint venture, it would have to make the CPNI available on nondiscriminatory terms to any unaffiliated electronic publisher. *Id.* Moreover, although section 222(d)(3) may provide telecommunications carriers greater latitude in responding to customer inbound marketing requests generally, Cox contends that section 274(c)(2)(A) mandates that unaffiliated entities be given access to the same services offered to BOC subsidiaries or joint venture partners, including access to CPNI. Cox Further Comments at 11. Finally, AT&T argues that if a BOC obtains verbal customer consent for use of CPNI in an inbound telemarketing or referral context, it must similarly solicit blanket consent to disclose CPNI to other unaffiliated providers of electronic publishing services. AT&T Further Comments at 21.

[592] SBC Further Comments at 16; U S WEST Further Comments at 26.

[593] *See, e.g.*, Bell Atlantic/NYNEX Further Comments at A-11; BellSouth Further Comments at 33; SBC Further Comments at 22, 24; U S WEST Further Comments at 31-32, 34. Also, according to the BOCs, the First Amendment prohibits the Commission from compelling a BOC to contact its customers and "speak" on behalf of non-affiliated entities. They reason, neither section 274(c)(2)(A) nor section 274(c)(2)(B) can be interpreted or applied to impose an unconstitutional burden on the BOCs. BellSouth Further Comments at 29-30, 32; PacTel Further Comments at 26-28, 31-33; SBC Further Comments at 24. Bell Atlantic/NYNEX also rejects any suggestion that the seeking of customer approval is a "transaction" under section 274(b)(3), but rather represents an arrangement between a BOC and its customer. Bell Atlantic/NYNEX Further Comments at A-11; *but see* PacTel Further Comments at 34 (a BOC seeking approval for or on behalf of a separated affiliate or electronic publishing joint venture would be a transaction subject to § 274(b)(3), and the BOC would be required to comply with the requirements of the Commission's order in CC Docket 96-150).

2. Discussion

173. For the reasons discussed in connection with section 272, we are likewise persuaded here that we should interpret section 274 to impose no additional CPNI requirements regarding the BOCs' use of CPNI in connection with their provision of electronic publishing. We find that both privacy and competitive concerns regarding BOCs' use, disclosure, or permission of access to CPNI for electronic publishing purposes, are protected in section 222(c)(1) through the requirement that customers must give their approval for such use.[594] Likewise, section 222(c)(2) ensures competitive access to CPNI by "any person," which therefore includes unaffiliated electronic publishers. Finally, pursuant to section 222(c)(3), competing electronic publishers would be entitled to obtain any aggregate customer information used by BOCs to market their, or an affiliated or related entity's, electronic publishing services. Thus, as in the case of section 272, where section 222 appropriately balances the potentially competing interests in the specific context of carriers' use and disclosure of CPNI, we conclude that we should not upset the balance by "superimposing" nondiscrimination standards in section 274.

VIII. COMMISSION'S EXISTING CPNI REGULATIONS

A. Overview

174. In the *Computer III*,[595] *GTE ONA*,[596] and *BOC CPE Relief*[597] proceedings, the Commission established a framework of CPNI requirements applicable to the enhanced services operations of AT&T, the BOCs, and GTE and the CPE operations of AT&T and the BOCs (*Computer III* CPNI framework).[598] As we observed in the *Notice*, the Commission adopted the *Computer III* CPNI framework, together with other nonstructural safeguards, to protect independent enhanced services providers and CPE suppliers from discrimination by

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[594] *See* discussion *supra* ¶ 45 regarding the treatment of information services under section 222(c)(1). Based on that interpretation, we agree with MCI that, insofar as electronic publishing is an information service, customer approval is a prerequisite for any carrier's use or disclosure of CPNI for electronic publishing purposes. MCI Further Reply at 4-5.

[595] *Computer III Phase I Order*, 104 FCC 2d 958, *supra* note 32.

[596] *GTE ONA Order*, 11 FCC Rcd 1388, *supra* note 33.

[597] *BOC CPE Relief Order*, 2 FCC Rcd 143, *supra* note 34.

[598] The Commission defines "enhanced services" as services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a); *NATA Centrex Order*, 101 FCC 2d 349, *see supra* note 178.

AT&T, the BOCs, and GTE.[599] The framework prohibited these carriers' use of CPNI to gain an anticompetitive advantage in the unregulated CPE and enhanced services markets, while protecting legitimate customer expectations of confidentiality regarding individually identifiable information.[600] Alternatively, for those carriers that maintain structurally separate affiliates in connection with their CPE and enhanced services operations, our *Computer II*[601] rule 64.702(d)(3) prohibits carriers from sharing CPNI with those affiliates unless it is made publicly available.[602] We likewise prohibit the BOCs from providing CPNI to their cellular affiliates unless they make the CPNI publicly available on the same terms and conditions.[603]

175. We conclude that the new CPNI scheme that we implement in this order, which is applicable to all telecommunications carriers, fully addresses and satisfies the competitive concerns that our *Computer III* framework as well as our *Computer II* and BOC CPNI cellular rules sought to address. Accordingly, we eliminate these existing CPNI requirements in their entirety.[604] Nevertheless, the record supports our specifying general minimum safeguards, applicable to all carriers, to ensure compliance with section 222's statutory scheme. Toward that end, we first require that all carriers conform their database systems to restrict carrier use of CPNI as contemplated in section 222(c)(1) and section 222(d)(3), through file indicators that flag restricted use, in conjunction with personnel training and supervisory review. Second, we impose recording requirements on carriers that serve both to ensure that use restrictions are being followed and to afford a method of verification in the event they are not.

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[599] *Notice* at 12516, 12530, ¶ ¶ 4, 40.

[600] *Id.* at 12516, ¶ 4.

[601] *Supra* note 31.

[602] 47 CFR § 64.702(d)(3).

[603] 47 C.F.R. § 22.903(f). This rule was part of the Commission's structural separation requirements in connection with the BOC provision of cellular services. That structural separation regime was implemented sixteen years ago, but recently was revised substantially in the *CMRS Safeguards Order*, *supra* note 51. The Commission expressly retained rule 22.903(f) in that order, however, pending the outcome of this CPNI proceeding.

[604] We do not, however, disturb the CPNI requirements which protect foreign-derived U.S. customer CPNI that the Commission recently implemented in the *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 & 95-22, Report and Order and Order on Reconsideration, FCC 97-398, at ¶ ¶ 172-176 (rel. Nov. 26, 1997) (*Foreign Participation Order*), *recon. pending*. These requirements are based on the general duty of every telecommunications carrier to protect the confidentiality of customer information, established in section 222(a), and are fully consistent with section 222(c). *Id.* at ¶ 176 & n.356. Accordingly, unlike the *Computer III* requirements that predated section 222, the requirements in the *Foreign Participation Order* remain in full force.

B. *Computer III* CPNI Framework

1. Background

176. The CPNI framework the Commission adopted prior to the 1996 Act, which applies only to the BOCs, AT&T, and GTE, and only in connection with their use of CPNI to market CPE and enhanced services, involves five general components. The first concerns customer notification. The current framework requires the BOCs, AT&T, and GTE to send annual notices of CPNI rights regarding enhanced services to all their multi-line business customers.[605] With respect to CPE, the BOCs must also send annual notices to multi-line business customers, and AT&T must provide a one-time notice to its WATS and private line customers. Each notice must be written, describe the carrier's CPNI obligations, the customer's CPNI rights, and include a response form allowing the customer to restrict access to CPNI.[606] Second, the BOCs and GTE, but not AT&T, must obtain prior written authorization from business customers with 20 or more access lines before using CPNI to market enhanced services.[607] All BOC and AT&T customers with fewer lines have the right to restrict access to their CPNI by carrier CPE personnel, and along with GTE customers, enhanced services personnel as well.[608] These carriers must also accommodate customer

[605] Customers with two or more access lines are multi-line customers. *Computer III Phase II Order*, 2 FCC Rcd 3072 (1987) at 3093-97, ¶ ¶ 141-174 (AT&T, BOCs must notify multi-line business customers of CPNI rights on annual basis); *GTE Safeguards Order*, 9 FCC Rcd at 4943 (applied CPNI requirements to GTE).

[606] *AT&T Structural Relief Recon. Order*, 104 FCC 2d at 764-68, ¶ ¶ 45-53; *BOC CPE Relief Order*, 2 FCC Rcd at 151-53, ¶ ¶ 55-70.

[607] *BOC Safeguards Order*, 6 FCC Rcd at 7605-14, ¶ ¶ 76-89; *GTE Safeguards Order*, 9 FCC Rcd at 4944-45, ¶ 45 (applied CPNI requirements to GTE).

[608] *AT&T Structural Relief Order*, 102 FCC 2d at 691-94, ¶ ¶ 62-67 (reasoning that customers who have the desire to have CPNI available only to network services personnel should be able to obtain network services on that basis, Commission required AT&T to limit CPNI access to network services personnel who have no involvement in CPE sales); *Computer III, Phase I Order*, 104 FCC 2d at 1086-92, ¶ ¶ 256-265 (in connection with its provision of enhanced services, AT&T must permit customers the right to restrict access to CPNI to network personnel); *BOC CPE Relief Order*, 2 FCC Rcd at 151-53, ¶ ¶ 55-70 (customers can restrict access to CPNI by BOC CPE marketing personnel); *Computer III Phase II Order*, 2 FCC Rcd at 3093-97, ¶ ¶ 141-174 (BOCs may use CPNI in their enhanced service operations provided that they establish procedures to honor the requests of customers to withhold CPNI from BOC enhanced services personnel); *GTE Safeguards Order*, 9 FCC Rcd at 4944-45, ¶ 45 (applied CPNI requirements to GTE); *BOC ONA Order*, 4 FCC Rcd at 209-34, ¶ ¶ 398-450 (ordered SBC to amend plan regarding residential and single line customers to permit all customers the right to restrict).

requests for partial or temporary restrictions on access to their CPNI.[609] Third, we require the BOCs, AT&T, and GTE to make CPNI available to unaffiliated enhanced services providers and CPE suppliers at the customer's request on the same terms and conditions as the CPNI is made available to their personnel.[610] Fourth, the BOCs must provide unaffiliated enhanced services and CPE providers any non-proprietary, aggregate CPNI that they share with their own personnel on the same terms and conditions.[611] GTE is subject to the same requirement for its enhanced services operations.[612] AT&T, however, is not subject to any Commission requirements with respect to aggregate CPNI.[613] Finally, the BOCs, AT&T, and GTE must use passwords to protect and block access to the accounts of customers that exercise their right to restrict.[614] We also mandate that the BOCs and GTE address their compliance with our CPNI requirements in their ONA, CEI, and CPE relief plans.[615]

177. The Commission acknowledged in the *Notice* that section 222 may address the anticompetitive concerns that its existing CPNI requirements had sought to address, and the Commission invited comment on which, if any, of its requirements may no longer be

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[609] *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1161-64, ¶ ¶ 86-115 (customers may authorize release of some or all of its CPNI for a specific time and/or for specific purposes); *GTE Safeguards Order*, 9 FCC Rcd at 4944-45, ¶ 45 (applied CPNI requirements to GTE); *BOC ONA Order*, 4 FCC Rcd at 209-34, ¶ ¶ 398-450 (accepted BOC plans for partial and temporary restrictions as well as U S WEST's and BellSouth's plan that if a customer seeks to restrict only a part of his or her CPNI, the company will advise the customer to restrict all of his or her CPNI and then authorize disclosure of selected portions of it to their enhanced services personnel).

[610] *AT&T Structural Relief Order*, 102 FCC 2d at 691-94, ¶ ¶ 62-67 (AT&T must make CPNI available to competing CPE suppliers at the customer's request); *Computer III, Phase I Order*, 104 FCC 2d at 1086-92, ¶ ¶ 256-265 (AT&T must make CPNI available to competing enhanced services providers upon customer's request); *BOC CPE Relief Order*, 2 FCC Rcd at 151-53, ¶ ¶ 55-70 (BOCs must make CPNI available to competing CPE suppliers upon customer's request); *Computer III Phase II Order*, 2 FCC Rcd at 3093-97, ¶ ¶ 141-174 (BOCs must make CPNI available to other enhanced services vendors upon customer's request); *GTE Safeguards Order*, 9 FCC Rcd at 4944-45, ¶ 45 (applied CPNI requirements to GTE).

[611] *Computer III Phase II Order*, 2 FCC Rcd at 3093-97, ¶ ¶ 141-174.

[612] *GTE Safeguards Order*, 9 FCC Rcd at 4944-45, ¶ 45.

[613] *Computer III Phase II Order*, 2 FCC Rcd at 3093-97, ¶ ¶ 141-174.

[614] *BOC ONA Order*, 4 FCC Rcd at 209-234, ¶ ¶ 398-450; *AT&T ONA Order*, 4 FCC Rcd at 2455-56, ¶ ¶ 48-55; *GTE ONA Order*, 11 FCC Rcd at 1419-25, ¶ ¶ 73-86.

[615] *Computer III Phase II Order*, 2 FCC Rcd at 3095, ¶ 156 (BOC ONA plans); *GTE ONA Order*, 11 FCC Rcd at 1419-25, ¶ ¶ 73-86.